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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 BILLY D. FOWLER,

9 Petitioner,

10 v.

11 MAGGIE MILLER-STOUT,

12 Respondent.

Case No. C09-5107BHS

ORDER OVERRULING
PETITIONER'S OBJECTIONS,
ADOPTING REPORT AND
RECOMMENDATION, AND
DISMISSING PETITION

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14 This matter comes before the Court on the Report and Recommendation of the
15 Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 18) and Petitioner's
16 Objections to the Report and Recommendation (Dkt. 19).

17 On February 27, 2009, Petitioner filed a Petition for Writ of Habeas Corpus. Dkt. 1.
18 On August 6, 2009, Judge Strombom issued a Report and Recommendation and
19 recommended that the Court deny the petition and dismiss this action. Dkt. 18. On August
20 19, 2009, Petitioner filed an Objection to the Report and Recommendation. Dkt. 19.

21 First, Petitioner "objects to the summarized facts in part as follows: At about 2:30
22 a.m. on November 2, 2003, a surveillance camera recorded a person cutting into a club."
23 Dkt. 19 at 1-2. Petitioner argues that nowhere in the record "is there any mention of a
24 person seen cutting into the club." *Id.* In summarizing the facts, Judge Strombom quoted
25 the Washington Court of Appeals' order dismissing Petitioner's personal restraint petition.
26 *Compare* Dkt. 13, Exh. 18 (order dismissing petition) *with* Dkt. 18 at 2. Therefore,
27 Petitioner is objecting to the state court record. In a federal habeas proceeding, state court

1 findings are presumptively correct and a petitioner bears the burden to rebut the presumption
2 by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). In this case, even if Petitioner
3 has rebutted the presumption of correctness, the exclusion of the factual statement would
4 have no affect on the merits of Petitioner's federal habeas claims.

5 Second, Petitioner "objects to the Procedural History in part as follows: [Petitioner]
6 filed a statement of additional grounds as part of his Direct Appeal." Dkt. 19 at 3. The
7 Court has reviewed the procedural history and adopts Judge Strombom's report as accurate.

8 Third, Petitioner requests an evidentiary hearing based on newly discovered evidence.
9 Dkt. 19 at 3-4. Judge Strombom found that:

10 an evidentiary hearing is not required in this case as [Petitioner's] habeas
11 claims are matters that can be resolved by reference to the state court record.
12 His habeas claims raise purely issues of law, rather than factual disputes, and
therefore, an evidentiary hearing to resolve questions of fact, is not necessary
to resolve his claims.

13 Dkt. 18 at 5. After reviewing Petitioner's claims and his alleged newly discovered evidence,
14 the Court agrees with Judge Strombom's finding and denies Petitioner's request for an
15 evidentiary hearing.

16 Fourth, Petitioner objects to Judge Strombom's recommendation that the Court
17 should deny Petitioner's first and third claims for relief. Dkt. 19 at 4-5. On these claims,
18 Judge Strombom found as follows:

19 The decisions by the Washington Court of Appeals and Washington
20 Supreme Court regarding [Petitioner's] first and third ground for relief were
not contrary to or an unreasonable application of clearly established federal
law, as determined by the U.S. Supreme Court.

21 Dkt. 18 at 13. Petitioner has failed to show any error of law in Judge Strombom's
22 conclusion. Regardless, the Court has reviewed the record and the petition. The Court
23 agrees with Judge Strombom's report as to Petitioner's first and third claims for relief and
24 denies these claims.

25 Fifth, Petitioner objects to Judge Strombom's recommendation that the Court should
26 deny Petitioner's second claim for relief. Petitioner objects by reasserting his original
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1 arguments on this issue. After review of the record, the Court agrees with Judge
2 Strombom's report as to Petitioner's second claim for relief and denies this claim.

3 Last, Petitioner objects to Judge Strombom's recommendation that the Court should
4 deny his fourth claim for relief. Dkt. 19 at 6-10. Judge Strombom found that Petitioner had
5 failed to exhaust his remedies on this claim and that he had also failed to show cause and
6 prejudice or a fundamental miscarriage of justice. Dkt. 18 at 17-23. Petitioner has failed to
7 show that Judge Strombom made any error of law or fact in reaching her conclusion.
8 Regardless, the Court reviewed the record and the petition. The Court agrees with Judge
9 Strombom's report on this issue and denies this claim.

10 The Court having considered the Report and Recommendation (Dkt. 18), Petitioner's
11 objections (Dkt. 19), and the remaining record, does hereby find and order:

- 12 (1) The Court **OVERRULES** Petitioner's Objections;
13 (2) The Court adopts the Report and Recommendation; and
14 (3) The Petition for Writ of Habeas Corpus (Dkt. 1) is **DISMISSED** because the
15 Court denies all of Petitioner's claims for relief.

16 DATED this 2nd day of October, 2009.

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BENJAMIN H. SETTLE
United States District Judge